



Dan Marovitch <dmarovitch@marovitchlaw.com>

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## Lowe v. Diversified Answer and Affirmative Defenses

4 messages

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Alex Burke <ABurke@burkelawllc.com>

Wed, May 16, 2012 at 1:09 PM

To: John Brigandi <JBrigandi@salvolawfirm.com>, gnapleton@rockfuscoconnelly.com, Cindy Salvo <csalvo@salvolawfirm.com>

Cc: dmarovitch@marovitchlaw.com

Cindy,

Reviewing Diversified's answer, I notice that it does not comply with Local Rule 10.1, which requires a "concise summary" of the paragraph to which it is directed.

### LR10.1 Responsive Pleadings

Responsive pleadings shall be made in numbered paragraphs each corresponding to and stating a concise summary of the paragraph to which it is directed.

Typically defendants just retype the allegations, and then place their answer to the allegations below. We request that defendant please amend its answer to comply.

The answer is also deficient as to at some of the alleged affirmative defenses. For starters, affirmative defense two, "bona fide error" is improperly pleaded. Fed.R.Civ.P. 9(b) requires that allegations of "mistake" in pleadings be stated with particularity. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). "Particularity" as used in Rule 9(b) means "the who, what, when, where, and how of the mistake: the first paragraph of any newspaper story." *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997). We request that Diversified please amend its answer to identify what error it alleges happened, if any.

We also question affirmative defenses four and five, that plaintiff's claims may be barred or diminished because of some right to setoff, because plaintiff is not a debtor here. We are not aware of any relationship between plaintiff and defendant, other than the fact that defendant kept calling plaintiff. Do you really contend that plaintiff owes money to your client? Similarly, does defendant really believe that a rogue employee loaded the autodialer with plaintiff's cell phone number repeatedly and over a multiple-month period, for personal gain? This seems unlikely. We expect Diversified either to delete these affirmative defenses, or respond fully to our interrogatories and document requests with information and documents/data that support them, pursuant to Fed.R.Civ.P. 11 and 37.

We request that Diversified bring its answer and defenses into compliance with the rules, by May 18, 2012. After that date, we will file our motion to strike the answer.

Please contact me with any questions at all.

Sincerely,

Alex Burke

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**Answer of Diversified.pdf**

357K

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**Cindy Salvo** <[csalvo@salvolawfirm.com](mailto:csalvo@salvolawfirm.com)>

Wed, May 16, 2012 at 2:07 PM

To: Alex Burke <[ABurke@burkelawllc.com](mailto:ABurke@burkelawllc.com)>, John Brigandi <[JBrigandi@salvolawfirm.com](mailto:JBrigandi@salvolawfirm.com)>,

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Cc: [dmarovitch@marovitchlaw.com](mailto:dmarovitch@marovitchlaw.com)

Today is 5/16. You are suggesting that we redraft the Answer by Friday. I cannot do this as I have depositions all day tomorrow and am otherwise tied up on Friday. Plus, I need time to review the contentions in your e-mail to see if I agree with you. I ask that you give until mid-next week before filing a motion to strike.

Cindy D. Salvo, Esq.

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**From:** Alex Burke [mailto:[ABurke@BurkeLawLLC.com](mailto:ABurke@BurkeLawLLC.com)]  
**Sent:** Wednesday, May 16, 2012 2:10 PM  
**To:** 'John Brigandi'; [gnapleton@rockfuscoconnelly.com](mailto:gnapleton@rockfuscoconnelly.com); 'Cindy Salvo'  
**Cc:** [dmarovitch@marovitchlaw.com](mailto:dmarovitch@marovitchlaw.com)  
**Subject:** Lowe v. Diversified Answer and Affirmative Defenses

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**Alex Burke** <[aburke@burkelawllc.com](mailto:aburke@burkelawllc.com)>

Wed, May 16, 2012 at 2:27 PM

Reply-To: [aburke@burkelawllc.com](mailto:aburke@burkelawllc.com)

To: Cindy Salvo <[csalvo@salvolawfirm.com](mailto:csalvo@salvolawfirm.com)>, John Brigandi <[JBrigandi@salvolawfirm.com](mailto:JBrigandi@salvolawfirm.com)>,  
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That seems reasonable. How about a week from Friday, May 25?

Alex Burke

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(sent from my handheld)

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**From:** Cindy Salvo <[csalvo@salvolawfirm.com](mailto:csalvo@salvolawfirm.com)>  
**Date:** Wed, 16 May 2012 15:07:11 -0400  
**To:** 'Alex Burke' <[ABurke@BurkeLawLLC.com](mailto:ABurke@BurkeLawLLC.com)>; 'John Brigandi' <[JBrigandi@SalvoLawFirm.com](mailto:JBrigandi@SalvoLawFirm.com)>;  
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**Cc:** <[dmarovitch@marovitchlaw.com](mailto:dmarovitch@marovitchlaw.com)>  
**Subject:** RE: Lowe v. Diversified Answer and Affirmative Defenses

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**Cindy Salvo** <[csalvo@salvolawfirm.com](mailto:csalvo@salvolawfirm.com)>

Wed, May 16, 2012 at 2:49 PM

To: aburke@burkelawllc.com, John Brigandi <JBrigandi@salvolawfirm.com>, gnappleton@rockfuscoconnelly.com  
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OK, will do.

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**From:** Alex Burke [mailto:[aburke@burkelawllc.com](mailto:aburke@burkelawllc.com)]

**Sent:** Wednesday, May 16, 2012 3:28 PM

**To:** Cindy Salvo; 'John Brigandi'; [gnappleton@rockfuscoconnelly.com](mailto:gnappleton@rockfuscoconnelly.com)

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**Subject:** Re: Lowe v. Diversified Answer and Affirmative Defenses

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